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United States Department of Energy
Office of Hearings and Appeals

In the Matter of: Personnel Security Hearing

Filing Date: October 25, 2017

Case No.: PSH-17-0075

Issued: February 22, 2018

Administrative Judge Decision

Janet R.H. Fishman, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXX (hereinafter referred to as “the individual”) to hold an access authorization¹ under the Department of Energy’s (DOE) regulations set forth at 10 C.F.R. Part 710, Subpart A, entitled “General Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.” As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines or Guidelines), I conclude that the individual’s access authorization should not be restored.

I. Background

The individual is employed by a DOE contractor in a position that requires him to hold a security clearance. In April 2017, the individual reported that he had been arrested for Driving While Intoxicated (DWI). Ex. 5. As a result, the local security office (LSO) called the individual in for a Personnel Security Interview (PSI) in May 2017. Ex. 11. In response to information gathered from the PSI and background investigation, a DOE consulting psychologist evaluated the individual. Ex. 6.

As the arrest and the psychologist's evaluation both raised unresolved security concerns, the LSO informed the individual in a Notification Letter dated September 5, 2017 (Notification Letter), that it possessed reliable information that created substantial doubt regarding his eligibility to hold a security clearance. In an attachment to the Notification Letter, the LSO explained that the derogatory information raised security concerns under "Guideline G: Alcohol Consumption,"

¹ Access authorization is defined as “an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material.” 10 C.F.R. § 710.5(a). Such authorization will be referred to variously in this Decision as access authorization or security clearance.

“Guideline I: Psychological Conditions,” and “Guideline J: Criminal Conduct” of the Adjudicative Guidelines (Guideline G, Guideline I, and Guideline J). Ex. 1.

Upon his receipt of the Notification Letter, the individual exercised his right under the Part 710 regulations by requesting an administrative review hearing. Ex. 2. The Director of the Office of Hearings and Appeals (OHA) appointed me the Administrative Judge in the case, and I subsequently conducted an administrative hearing in the matter. At the hearing, the LSO introduced 14 numbered exhibits (Exhibits 1-14) into the record and presented the testimony of the DOE psychologist. The individual introduced two lettered exhibits (Exhibits A-B) into the record and presented the testimony of five witnesses, including himself. The exhibits will be cited in this Decision as “Ex.” followed by the appropriate numeric or alphabetic designation. The hearing transcript in the case will be cited as “Tr.” followed by the relevant page number.²

II. Regulatory Standard

A DOE administrative review proceeding under Part 710 is not a criminal matter, where the government has the burden of proving the defendant guilty beyond a reasonable doubt. Rather, the regulations require me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person’s access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. See *Department of Navy v. Egan*, 484 U.S. 518, 531 (1988) (“clearly consistent with the national interest” standard for granting security clearances indicates “that security determinations should err, if they must, on the side of denials”); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

The individual must come forward at the hearing with evidence to convince the DOE that restoring his access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). The individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

III. Notification Letter and Associated Security Concerns

As previously mentioned, the Notification Letter included a statement of derogatory information that raised concerns about the individual’s eligibility for access authorization. The information in the letter specifically cites Guidelines G, I, and J of the Adjudicative Guidelines. Guideline G relates to security risks arising from alcohol consumption. Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise

² OHA decisions are available on the OHA website at www.energy.gov/oha. A decision may be accessed by entering the case number in the search engine at that site.

questions about an individual's reliability and trustworthiness. Guideline G at ¶ 21. In citing Guideline G, the LSO stated that it relied upon the July 2017 written evaluation by the DOE psychologist, which diagnoses the individual as "habitually using alcohol to the point of impairment...without adequate evidence of rehabilitation." Ex. 1 at 1. Additionally, the LSO cited that: (1) the individual was arrested and charged with DWI in April 2017; (2) the individual stated that from October 2014 to April 2017, he would consume three to four beers every weekend and would become intoxicated two times per year by consuming six beers; (3) the individual was arrested and charged with DWI in November 2011; and (4) the individual had been charged with Providing Alcohol to a Minor in September 2005. Ex. 1 at 1.

Guideline I relates to certain emotional, mental and personality conditions that can impair judgment, reliability, or trustworthiness. Guideline I at ¶ 27. An opinion by a duly qualified mental health professional that an individual has a condition that may impair judgment, stability, reliability, or trustworthiness can raise a security concern under Guideline I. *Id.* at ¶ 28(b). With respect to Guideline I, the LSO relied upon the DOE psychologist's conclusion that the individual has personality tendencies which indicate that he is not trustworthy or reliable, based upon the individual's alleged false claims of abstinence and his minimization of his alcohol consumption during the DOE psychologist's examination. Ex. 1 at 2.

Guideline J relates to an individual's criminal conduct which raises a doubt about a person's judgment, reliability, and trustworthiness. Guideline J at ¶ 30. Such conduct calls into question a person's ability or willingness to comply with laws, rules, and regulations. *Id.* To invoke Guideline J, the LSO cited the individual's April 2017 DWI, his November 2011 DWI, and his September 2005 charge of Providing Alcohol to a Minor. Ex. 1 at 2.

In light of the information available to the LSO, the LSO properly invoked Guidelines G, I, and J.

IV. Findings of Fact

The individual did not dispute the facts alleged in the Notification Letter. Ex. 2 at 1. The individual did, however, challenge the psychologist's conclusions regarding his alcohol use and whether there is a pattern of evidence establishing that the individual is not honest, reliable, or trustworthy. Ex. 2. I have carefully considered the totality of the record in reaching the findings of fact set forth below.

Following the April 2017 DWI, the LSO interviewed the individual in a May 2017 Personnel Security Interview (PSI). During the PSI, the individual stated that, immediately following the DWI arrest, he abstained from consuming alcohol. Ex. 11 at 34. However, he explained that prior to that time, he would consume, on average, approximately three to four beers in a week, and had become intoxicated two or three times, since 2014, after consuming six beers. *Id.* at 36-37. The individual estimated that on the night he was arrested, he had consumed approximately three to five beers within a two-hour time frame. *Id.* at 13. Following the PSI, the LSO referred the individual for an evaluation with the DOE psychologist.

In June 2017, the individual underwent a psychological evaluation performed by the DOE psychologist. In the July 2017 psychological report, the psychologist noted that this was not the

first occasion during which he had evaluated the individual's alcohol consumption. Ex. 6 at 3. The psychologist explained that following a 2011 DWI, he evaluated the individual and opined that the individual "had demonstrated control over his use of alcohol, [and] was receiving appropriate treatment." *Id.* However, the psychologist noted that, in spite of a recommendation from the individual's counselor to permanently abstain from alcohol, the individual "did not believe that he had an alcohol problem and so he did not follow" the recommendation and began drinking approximately six months after this initial evaluation. *Id.* at 4.

During the June 2017 evaluation, the individual reported that on the night he was arrested for the DWI, he refused to take the breath test; however, based on the individual's report that he drank three to five beers within a two-hour time frame, the psychologist calculated that the individual's blood alcohol content (BAC) that night was .07 g/210L,³ which would likely have impaired his driving skills. *Id.* at 5.

The individual reported that he has not consumed any alcohol since his arrest. *Id.* at 6.

In order "to provide objective evidence of [the individual's] claimed abstinence," the psychologist ordered a phosphatidylethanol (PEth) test. *Id.* The results were reviewed by a psychiatrist who reported that the PEth test was positive at a level of 48 ng/mL, which provided "medical evidence that the [individual] has been consuming alcohol." *Id.* The psychologist noted that the PEth test indicated that "contrary to his assertion of abstinence over the last nine weeks, [the individual] has in fact been drinking." *Id.*

Based on his evaluation and utilizing the *Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition* (DSM-5), the psychologist diagnosed the individual as "habitually using alcohol to the point of impaired judgment" without adequate evidence of rehabilitation. *Id.* at 2, 7. The psychologist explained that, although the individual has claimed abstinence from alcohol, "the evidence is that he has been drinking within three or four weeks of the evaluation." *Id.* at 7. While the LSO did not request information with regard to reformation, the psychologist recommended total abstinence for 12 months to be documented by four PEth tests. *Id.* In order to show adequate rehabilitation, the psychologist suggested that the individual complete an intensive outpatient program in substance abuse and participate in its weekly aftercare or participate in a twelve-step program for a minimum of 12 months. *Id.* Finally, the psychologist diagnosed the individual with personality tendencies which allow him to not be trustworthy or reliable, as evidenced by his "false claims of abstinence and his minimization of how much alcohol he consumes." *Id.* at 8.

V. Hearing Testimony

At the hearing, the individual's counselor testified that she met with him on five occasions after he completed an Intensive Outpatient Treatment Program (IOP). Tr. at 12. The counselor stated that she diagnosed the individual with "alcohol abuse disorder with episodic" under the DSM-IV

³ The DOE psychologist relied on the website *rupissed.com* to determine that the individual's BAC level was at the .07 percent, stating that "'rupissed' (which is British slang for 'drunk') allows the consideration of the relevant Widmark variables (e.g., height, weight, gender, age, specific alcohol content of a beverage)." Ex. 6 at 2.

and DSM-5.⁴ *Id.* at 34. However, she testified that the individual had indicated to her that “it couldn’t be...bad luck or coincidence that he’s in this much trouble and that he obviously needed to learn some things and quit drinking.” *Id.* at 19. She indicated that he was motivated and receptive to her recommendations. *Id.* She also stated that she helped him identify an Alcoholics Anonymous (AA) group, and he had been attending meetings for a month and had obtained a sponsor. *Id.* at 22, 32, 38. She explained that, although the individual was not currently involved in any aftercare following his IOP, due to a conflict with his current AA meetings, she was “trying to get him into [her] aftercare program.” *Id.* at 24-25.

The counselor stated that, to her knowledge, the individual had abstained from alcohol since the day he was arrested, approximately eight months prior thereto. *Id.* at 30. She based her opinion on the fact that the individual “maintained, through consistent questioning, that he has not drunk” and “[b]ecause I’ve chosen to believe him, based on the other factors.” *Id.* at 32. She testified that the individual is direct and honest. *Id.* at 13. The counselor concluded that, if the individual continues with AA, counseling, and aftercare, he has a low risk of relapse. *Id.* at 27.

The individual’s wife testified regarding the individual’s alcohol consumption. She stated that immediately following the DWI arrest, he abstained from alcohol and does not intend to drink in the future. *Id.* at 51, 67. The wife detailed that following his receipt of the DOE psychologist’s evaluation, the individual attempted to start an IOP in September 2017; however, “the days didn’t work.” *Id.* at 58. Therefore, the individual started the IOP in October 2017. *Id.* at 58. When questioned as to what actions the individual took between the DWI arrest in May and the October IOP, the wife stated that he just abstained from alcohol. *Id.* at 72-73. She testified that although she does not believe the individual has a drinking problem, she thinks he benefitted from the IOP and the counseling sessions as “his whole demeanor is different.” *Id.* at 59-60.

Similarly, two of the individual’s friends, one of whom is his supervisor, testified on his behalf, stating that the individual no longer consumes alcohol and feels positive about the change in his life. *Id.* at 102, 103, 112, 114. His supervisor additionally testified that he considers the individual to be reliable, and he further noted that the individual reported his DWI arrest. *Id.* at 91, 96. The individual’s friend echoed this sentiment, stating that he “absolutely” trusts the individual. *Id.* at 115.

The individual testified that he has abstained from alcohol following his April 2017 DWI, although it was not a condition of his bond. *Id.* at 126. The individual maintained that he has not consumed alcohol since the arrest, despite the PEth test results indicating otherwise. *Id.* at 127. He further testified that it is his intention to completely abstain from alcohol in the future. *Id.* at 145.

The individual explained that following the DWI arrest, he reported the incident to his supervisor. *Id.* at 130. As a result, his employer directed him to the psychologist at his work site. *Id.* at 131. The work site psychologist referred him to the Employee Assistance Program, which referred him to an IOP. *Id.* at 133. When questioned as to why he did not begin the IOP until October, approximately six months after his arrest, the individual explained that following the May PSI, he was evaluated by the DOE psychologist in June, and he could not begin the IOP in July, August, or September because that was his “busy time” when he was working both for his employer and

⁴ The DOE psychologist explained that there is no DSM-5 diagnosis for Alcohol Abuse, but Alcohol Abuse was a diagnosis under a previous version of the DSM. Tr. at 190.

for his own company. *Id.* at 160. He testified that he “was trying to hold off to start everything” until the “time chang[ed]” and he could work shorter days. *Id.* at 160. He clarified that during this time, he was not seeking treatment, but remained abstinent and engaged in ten minute “follow-ups” with the work site psychologist. *Id.*

The individual testified that he began a five week IOP in October and started his counseling prior to the end of the IOP. *Id.* at 162. The individual explained that during the IOP, he began attending AA meetings and continued with those meetings after successfully completing the program in November. *Id.* at 140, 161-62.

In addressing his prior criminal charges, he explained that when he was charged with Providing Alcohol to a Minor in 2005, he was dating a 20-year-old woman. *Id.* at 153. He testified that they were “hanging out” and when she left his house, she was pulled over. *Id.* The individual explained that, because he lived in a small town, the police knew that she had been with him, and as a result, he was charged with Providing Alcohol to a Minor. *Id.* He additionally testified that his 2011 DWI arrest was reduced to obstructing the highway. *Id.* at 151.

The DOE psychologist testified that he had evaluated the individual in 2012 and “was pretty sure that he would stop drinking.” *Id.* at 187. The psychologist stated that he was impressed with the individual because he was in treatment, and for that reason, he gave the individual “a pass.” *Id.* at 187. The psychologist stated that he was concerned with the individual’s judgment due to the fact that he is back in the personnel security process again as the result of a second DWI. *Id.* at 188.

The psychologist testified that he did not diagnose the individual pursuant to the DSM-5, but he stated that his concern is the individual’s honesty regarding his alcohol use, as the individual uses alcohol more than he is admitting. *Id.* 190-91. The psychologist explained that he bases his assertion of dishonesty on the fact that the individual had a positive PEth test (with a result of 48 ng/mL) while claiming that he does not consume alcohol. *Id.* 173-81, 191. The psychologist explained that “anytime that [there is] a positive PEth, which is 20 nanograms per milliliter or greater,... there is no question that alcohol has been consumed.” *Id.* at 173.

While the psychologist did not diagnose the individual pursuant to the DSM-5, he diagnosed that the individual habitually uses alcohol to impairment without evidence of rehabilitation. *Id.* at 197. The psychologist explained that “habitually” is defined as once or more a month. *Tr.* at 197. Impairment is defined as becoming intoxicated at a .06 or .07 BAC. *Id.* at 197-98. In terms of rehabilitation, the psychologist explained that, at the time of the hearing, the individual had only been in treatment for a short time and had not begun an aftercare program. *Id.* at 199.

In mitigation of the security concerns, the individual affirmed that he is abstaining from alcohol, intends to do so in the future, has sought treatment, and continues to seek support from counseling and AA. He also advanced that because he has eliminated alcohol from his life, he has eliminated any security concerns regarding criminal conduct, as all of his criminal activity involved alcohol.

VI. Analysis

As an initial matter, I note that legitimate security concerns exist as a result of the individual's alcohol-related arrests and the DOE psychologist's diagnosis. My independent analysis of the evidence leads me to a finding that the individual has not sufficiently mitigated all of the security concerns noted by the LSO, specifically with regard to Guidelines G and J.

I have thoroughly considered the record of this proceeding, including the submissions tendered in this case and the testimony of the witnesses presented at the hearing. In resolving the question of the individual's eligibility for access authorization, I have been guided by the applicable factors prescribed in 10 C.F.R. § 710.7(c) and the Adjudicative Guidelines. After due deliberation, I have determined that the individual's security clearance should not be restored. I cannot find that restoring the individual's DOE security clearance will not endanger the common defense and security, and is clearly consistent with the national interest. 10 C.F.R. § 710.27(a). The specific findings that I make in support of this decision are discussed below.

A. Guideline G

Alcohol-related incidents away from the workplace, such as driving while under the influence or other incidents of concern, can raise a security concern and may disqualify an individual from continuing to hold a security clearance. *See* Guideline G at ¶ 22(a). Furthermore, habitual consumption of alcohol to the point of impaired judgment, regardless of whether the individual is diagnosed with an alcohol use disorder, can raise a security concern and serve as a disqualifier. *See id.* at ¶ 22(c). Here, the individual has a history of three alcohol-related criminal incidents, and the DOE psychologist opined that he is a habitual consumer of alcohol to the point of impaired judgment, an opinion that the psychologist maintained even after he heard the testimony presented at the hearing.

The individual recently completed an intensive outpatient alcohol program, is attending AA meetings, and is engaged in counseling. However, the record shows that, following his 2011 DWI, he engaged in similar activities (completing an alcohol education program and attending counseling). At that time, he was advised to permanently abstain from alcohol, yet he chose to continue to consume alcohol. As a result, he was arrested once more for the same conduct less than six years later. Not only does the reoccurrence of a DWI arrest demonstrate that such conduct is not an anomaly for the individual, but it casts doubt on the individual's reliability and judgment. *Contra id.* at ¶ 23(a) (stating as a mitigating condition that "the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or judgment").

Furthermore, at the time of the hearing, the individual had only been actively involved in treatment for approximately three months, and he had not yet engaged in the recommended aftercare. In spite of the referral to an IOP from the Employee Assistance Program in May 2017, the individual did not begin the IOP until approximately six months later, in October 2017. The DOE psychologist stated that in order to demonstrate rehabilitation, the individual needed to complete an intensive outpatient program and actively participate in weekly aftercare or participate in a twelve-step program for a minimum of 12 months. At the time of the hearing, the individual had

not engaged in weekly aftercare and he had only attended AA meetings for approximately one month. For these reasons, I conclude that the security concerns under Guideline G have not been sufficiently mitigated.

B. Guideline I

Certain personality conditions can impair judgment, reliability, or trustworthiness. *See* Guideline I at ¶ 27. Here, the DOE psychologist concluded that the individual has “personality tendencies which allow him to not be trustworthy or reliable.” Ex. 6 at 8. The psychologist stated that the individual’s false claim of abstinence and his minimization of the amount of alcohol he consumes evidences these tendencies. *Id.*

Denial and minimization of alcohol use⁵ is a common symptom in such cases and appears to explain the individual’s behavior. Nothing in the record indicates that the individual is deceitful in any other aspect of his life. To the contrary, the individual’s counselor testified that she considers him to be honest, and his friends testified that he is reliable and trustworthy. For these reasons, I find that the individual has resolved the security concern under Guideline I.

C. Guideline J

Evidence of criminal conduct, including matters of official record, can raise a security concern and may serve as a disqualifying condition, regardless of whether the individual was formally charged, prosecuted or convicted. Guideline J at ¶ 31(b). These security concerns can be mitigated if the conduct happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment. *Id.* at ¶ 32(a). Here the individual was charged with Providing Alcohol to a Minor in 2005 and arrested for DWI in November 2011. Not more than six years later, after completing an alcohol education course, undergoing counseling, and being advised to permanently abstain from alcohol, the individual was arrested a second time for DWI in April 2017. This repetition of alcohol-related criminal offenses demonstrates a pattern of behavior, and thus, I determine that the security concerns under Guideline J have not been sufficiently mitigated.

VII. Conclusion

In the above analysis, I have found that there was sufficient derogatory information in the possession of the DOE that raises serious security concerns under Guidelines G, I, and J. After considering all of the relevant information, favorable and unfavorable, in a comprehensive common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I have found that the individual has not brought forth sufficient evidence to resolve the security concerns associated with Guidelines G and J. Accordingly, I have determined that the individual’s access authorization should be not restored. The parties may seek review of this Decision by an Appeal Panel under the regulations set forth at 10 C.F.R. § 710.28.

⁵ At the hearing, the DOE psychologist admitted that the individual’s minimizations regarding his alcohol use were “a small minimization.” Tr. at 228.

Janet R.H. Fishman
Administrative Judge
Office of Hearings and Appeals